Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,

Petitioners,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPT. OF HEALTH, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE HONORABLE JOHN K. OLSON IN SUPPORT OF PETITIONERS

G. Eric Brunstad, Jr.
Counsel of Record
Dennis H. Hranitzky
Mark P. DiPerna
Kate M. O'Keeffe
Victoria Campbell Fitzpatrick
Mayer B. Grashin
Kevin P. Brost
Negin Hadaghian
Rabia Muqaddam
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... *i*

TABLE OF AUTHORITIES ..... *v*

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

A. The History of Discrimination Against Gay People Is Ancient, Pervasive, Violent, Abusive, and Ongoing 5

1. The History of Discrimination Against Gays and Lesbians Is One of Violent Criminalization 5

2. Discrimination Has Persisted Since the Class Became Identifiable 6

3. Discriminatory Violence Against Gay Individuals Continues 8

B. The Legislative History of the State Laws Reveals that They Are Outgrowths of, and Perpetuate, Prejudice Against Gay People 11

TABLE OF CONTENTS
(continued)

Page

1. The State Laws, Like DOMA, Arose in Reaction to Efforts To Recognize Marriage Equality 12

2. The State Laws, Like DOMA, Are Designed To Prevent Marriage Equality and Are Based on Discriminatory Animus 15

3. In Considering the State Laws, as with DOMA, Sponsoring Legislators Cast Homosexuality in Exaggerated Terms as Immoral, Aberrant, and Threatening 17

4. In Considering the State Laws, Sponsoring Legislators Further Disparaged and Trivialized Same-Sex Marriage, as Did the Sponsors of DOMA 19

5. The Historical Record Behind DOMA and the State Laws Reveals the Same Stereotypical Disapproval of Gay People 22

TABLE OF CONTENTS
(continued)

Page

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated the State Laws Has Doomed Other Invidiously Discriminatory Legislation 24

1. The Grounds Used To Justify the State Laws Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes.....25

2. The Grounds Used To Justify the State Laws Track the Invidious Grounds Used To Justify Discrimination Against Women 28

D. Given that Laws Prohibiting Same-Sex Marriage Embody Invidious Discrimination, They Should Be Subject to at Least Intermediate Scrutiny 30

E. The State Laws Do Not Serve a Legitimate, Important, or Compelling Interest, but Rather Simply Rest on Stereotype and Animus.....35

TABLE OF CONTENTS
(continued)

Page

1. Laws Prohibiting Same-Sex Marriage Do Not Promote Responsible Procreation 36

2. No Government Interest Is Furthered by Taking a "Wait and See" Approach Before Changing the Definition of Marriage.....38

3. The States' Interest in Defining the Marital Relationship Does Not Justify Unconstitutional Discrimination 39

4. Tradition Alone Is Not a Legitimate State Interest 39

F. The State Laws Violate Petitioners' Fundamental Right To Travel.....40

CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Able v. United States,
968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998) 5

Att'y Gen. of N.Y. v. Soto-Lopez,
476 U.S. 898 (1986) 41, 42

Baehr v. Lewin,
852 P.2d 44 (Haw. 1993) 13

Baehr v. Miike,
No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996) 13

Baskin v. Bogan,
766 F.3d 648 (7th Cir. 2014) 10, 37, 40

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2014) 37

Boutilier v. INS,
363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967) 8

Bowen v. Gilliard,
483 U.S. 587 (1987) 3, 32

Bowers v. Hardwick,
478 U.S. 186 (1986) 28

TABLE OF AUTHORITIES
(continued)

Page

Bradwell v. Illinois,
83 U.S. 130 (1872) 28

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) ..... *passim*

Clark v. Jeter,
486 U.S. 456 (1988) 33

De Leon v. Perry,
975 F. Supp. 2d 632 (W.D. Tex. 2014)..... 11

Dunn v. Blumstein,
405 U.S. 330 (1972) 42

Eggers v. Olson,
231 P. 483, 484 (Okla. 1924)..... 25

Frontiero v. Richardson,
411 U.S. 677 (1973) 39

Goodridge v. Dep't. of Pub. Health,
440 Mass. 309 (2003) 15

Green v. State,
58 Ala. 190 (1877) 26

J.E.B. v. Alabama,
511 U.S. 127 (1994) 31

TABLE OF AUTHORITIES
(continued)

Page

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014) 37, 40

Lawrence v. Texas,
539 U.S. 558 (2003) 6, 40

Loving v. Virginia,
388 U.S. 1 (1967) 25

Pedersen v. Office of Pers. Mgmt.,
881 F. Supp. 2d 294 (D. Conn. 2012) ..... *passim*

Pennegar v. State,
10 S.W. 305 (Tenn. 1889) 25

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) 9

Plyler v. Doe,
457 U.S. 202 (1982) 2, 30

Rowland v. Mad River Local School Dist.,
470 U.S. 1009 (1985) 5

Saenz v. Roe,
526 U.S. 489 (1999) 41, 42, 43

Scott v. Georgia,
39 Ga. 321 (1869) 27

TABLE OF AUTHORITIES
(continued)

Page

Shapiro v. Thompson,
394 U.S. 618 (1969) 42

SmithKline Beecham Corp. v. Abbott Labs.,
740 F.3d 471 (9th Cir. 2014) 31

Stanton v. Stanton,
517 P.2d 1010 (Utah 1974), *rev'd*, 421
U.S. 7 (1975) 29

Tanco v. Haslam,
7 F. Supp. 3d 759 (M.D. Tenn. 2014) 32

U.S. Dep't of Agric. v. Moreno,
413 U.S. 528 (1973) 4

United States v. Guest,
383 U.S. 745 (1966) 41

United States v. Virginia,
518 U.S. 515 (1996) 3, 4, 31

United States v. Windsor,
133 S. Ct. 2675 (2013) .....*passim*

Watkins v. U.S. Army,
875 F.2d 699 (9th Cir. 1989) 39

Windsor v. United States,
699 F.3d 169 (2d Cir. 2012) .....*passim*

TABLE OF AUTHORITIES
(continued)

Page

Zablocki v. Redhail,
434 U.S. 374 (1978) 43

Zobel v. Williams,
457 U.S. 55 (1982) 41

FEDERAL CONSTITUTION AND STATUTES

U.S. CONST. amend. XIV, § 1 30

1 U.S.C. § 7 13

28 U.S.C. § 1738 13

110 Stat. 2419 13

STATE CONSTITUTION AND STATUTES

KY. CONST. § 233A 15

MICH. CONST. art. 1, § 25 15

OHIO CONST. art. XV, § 11 15

TENN. CONST. art. XI, § 18 15

Ky. Rev. Stat. Ann. §§ 402.005-045 14

Ky. Rev. Stat. Ann. § 402.020 21

Mich. Comp. Laws Ann. § 551.1 14

TABLE OF AUTHORITIES
(continued)

Page

Mich. Comp. Laws Ann. § 551.3 21

Ohio Rev. Code § 3101.01 15

Tenn. Code Ann. § 36-3-113..... 14, 26

FEDERAL LEGISLATIVE MATERIALS

2 Cong. Rec. 4342 (1874)..... 29

142 Cong. Rec. 16,969 (1996)..... 20

142 Cong. Rec. 16,971 (1996)..... 19, 20

142 Cong. Rec. 16,972 (1996)..... 17, 22, 23

142 Cong. Rec. 16,974 (1996)..... 19, 23

142 Cong. Rec. 16,978 (1996)..... 19, 23

142 Cong. Rec. S10,101 (daily ed. Sept. 10, 1996) 17

142 Cong. Rec. S10,110 (daily ed. Sept. 10, 1996) 17

142 Cong. Rec. S10,117 (daily ed. Sept. 10, 1996) 20

Cong. Globe, 37th Cong., 2d Sess., app. 84 (1862) 25

TABLE OF AUTHORITIES
(continued)

Page

H.R. Rep. No. 104-664 (1996) 13, 16, 22

Subcomm. on Investigations to Comm. on Expenditures in the Exec. Dep'ts, Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 81-241 (1950) 7, 8

STATE LEGISLATIVE MATERIALS

Hearing on H.B. 13 Before the H. Judiciary Comm., 1998 Gen. Assemb., Reg. Sess. (Ky. 1998)..... 27

Hearing on H.B. 272 Before the Ohio H. of Rep., 125th Gen. Assemb. Reg. Sess. (Ohio 2003) 15, 17, 18

Hearing on H.B. 272 Before the Ohio S., 125th Gen. Assemb. Reg. Sess. (Ohio 2004) 20, 24

Hearing on H.B. 2907 Before the H. Judiciary Comm., 99th Gen. Assemb. Reg. Sess. (Tenn. 1996)..... 23

Hearing on S.B. 2305 Before the Tenn. S., 99th Gen. Assemb., Reg. Sess. (Tenn. 1996) 21

TABLE OF AUTHORITIES
(continued)

Page

House Legislative Analysis of Mich. House Bill 5662 of 1996 (June 28, 1996) 14

Senate Legislative Analysis of Mich. Senate Bill 937 and House Bill 5662 (Mar. 10, 1996) 21

OTHER AUTHORITIES

Daniel Borunda, *I couldn't make it; I love you guys: Gay teenager, 16, killed himself after bullies taunted him for two years and threatened to burn him*, Daily Mail (JUNE 14, 2012), http://www.dailymail.co.uk/news/article-2159164/Brandon-Elizares-16-killed-bullies-taunted-years-threatened-burn-him.html 10

Adrianna M. Chavez, *El Paso Gay Teen Commits Suicide After Being Bulled*, EL PASO TIMES (JUNE 13, 2012), *available at* http://www.elpasotimes.com/ci_20869646/. 10

William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657 (2011) 6, 7

TABLE OF AUTHORITIES
(continued)

Page

Gay, Lesbian, and Straight Education Network National School Climate Survey, *available at* http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf 10

Gregory M. Herek, *Evaluating the Methodology of Social Science Research on Sexual Orientation and Parenting: A Tale of Three Studies*, 48 U.C. DAVIS L. REV. 583 (2014) 37

Press Release, Fed. Bureau of Investigation, FBI Releases 2011 Hate Crime Statistics (Dec. 10, 2012), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2011-hate-crime-statistics 9

Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J.L. GENDER & SOC'Y 1 (2010) 43

Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966) 25

TABLE OF AUTHORITIES
(continued)

Page

Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996) 9

INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is the Honorable John Karl Olson, a United States Bankruptcy Judge. In November 2010, Judge Olson married G. Steven Fender in the Commonwealth of Massachusetts. Judge Olson and Mr. Fender currently reside in Florida.

On August 21, 2014, a federal district court in Florida held that plaintiffs challenging Florida's laws prohibiting same-sex marriages within the State, and denying recognition of same-sex marriages lawfully performed in other States, were substantially likely to prevail on their claims and granted a preliminary injunction barring enforcement of the provisions. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1291 (N.D. Fla. 2014). The ruling was temporarily stayed, but went into effect January 6, 2015. The district court's ruling is currently on appeal to the Eleventh Circuit (No. 14-14061). Thus, Judge Olson has a direct and personal interest in the outcome of this case.

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioners and Respondents have consented to the filing of this brief. Respondents' blanket consents have been filed, and a copy of Petitioners' joint consent is filed herewith.

In addition to addressing the history of discrimination against gay people, the distinct contribution of this brief is to demonstrate the discriminatory origins and rationalizations for laws prohibiting the performance and recognition of same-sex marriages in comparison with the similar discriminatory origins and rationalizations for a variety of other unconstitutional laws, namely the federal Defense of Marriage Act ("DOMA"), various state anti-miscegenation statutes, and laws discriminating against women. In this way, the state laws at issue in this case may be placed in proper context, and their origins and rationalizations understood for what they truly are. This brief also addresses why the laws in question unconstitutionally violate Petitioners' right to travel.

SUMMARY OF THE ARGUMENT

The Equal Protection Clause mandates that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). While the general rule is that a law satisfies equal protection if it has a rational basis, where a law categorizes on the basis of certain "suspect" or "quasi-suspect" classes, courts apply heightened scrutiny and require the government to demonstrate that the law furthers an important or compelling governmental interest.

The Court has enumerated four factors that determine if a classification is subject to heightened scrutiny. Examination of these factors as they bear on sexual orientation makes clear that gay people are a suspect or quasi-suspect class, and that the Sixth Circuit incorrectly subjected the same-sex marriage prohibitions at issue to rational basis review. In particular, gay people have long been the victims of a dehumanizing and often brutal history of discrimination. *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 317 (D. Conn. 2012). This history, together with the fact that the group is a minority that lacks political power, establishes that the same-sex marriage prohibitions at issue must be subject to at least intermediate scrutiny. Further, sexual orientation satisfies the other factors the Court looks to in deciding whether to apply intermediate scrutiny: homosexuality is an immutable characteristic and has no bearing on an individual's ability to contribute to society. *See, e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

Where, as here, intermediate scrutiny is warranted, a State must, at a minimum, provide an "exceedingly persuasive" justification that the legislation "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Critically, the

justification must be "genuine" and must not have been "invented post hoc in response to litigation." *Id.* As set forth below, the governmental interests offered in favor of the state laws at issue here prohibiting same-sex marriage (the "State Laws") fall into four general categories: (1) promoting responsible procreation and providing the optimal environment for children; (2) the States' desire to adopt a "wait and see" approach before changing the definition of marriage; (3) the States' sovereign interest in defining the marital relationship; and (4) upholding tradition and morality. None of these alleged rationales justify the discriminatory laws at issue. In reality, they rest merely "on irrational prejudice," *Cleburne*, 473 U.S. at 450, and a "desire to harm a politically unpopular group," *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973), and thus cannot survive any level of scrutiny, let alone intermediate scrutiny.

Finally, the State Laws are unconstitutional for the additional reason that they infringe upon Petitioners' fundamental right to travel by deterring travel to a State that disregards the dignity of the couples' same-sex union and treats them as second-class citizens. These laws, which are based on animus and irrational prejudice, cannot survive even the lowest level of review, let along the heightened scrutiny applied to violations of fundamental rights.

ARGUMENT

A. The History of Discrimination Against Gay People Is Ancient, Pervasive, Violent, Abusive, and Ongoing.

"It is easy to conclude that homosexuals have suffered a history of discrimination." *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012); *see also Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("homosexuals have historically been the object of pernicious and sustained hostility"). That bare conclusion, however, is an understatement. In order to avoid minimizing or trivializing the suffering of gay people, it is important to consider carefully the breadth and scope of the persecution of them that began long ago and continues to this day.

1. The History of Discrimination Against Gays and Lesbians Is One of Violent Criminalization.

The "virulent hostility" toward gay people dates back to at least the second half of the twelfth century. *Able v. United States*, 968 F. Supp. 850, 854 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998). By the Middle Ages, "homosexuality became more and more associated with heresy," and laws were passed that imposed "death by burning on homosexual men." *Id.* (citing John Boswell, *Christian-*

ity, Social Tolerance and Homosexuality 281-84 (1980)).

The earliest English laws forbidding homosexual conduct, including a 1533 statute, were based on ancient Judeo-Christian prohibitions. *Pedersen*, 881 F. Supp. 2d at 315. The American colonies followed the English tradition. *Id.*; *see also* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 687 (2011). The historic criminalization of homosexual conduct in America, beginning with the Massachusetts Bay Colony in 1641, *Pedersen*, 881 F. Supp. 2d at 315, and lasting until this Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), constitutes "telling proof of animus and discrimination against homosexuals in this country." *Windsor*, 699 F.3d at 182.

2. Discrimination Has Persisted Since the Class Became Identifiable.

Historians generally agree that the conceptualization of gay people as a class began in the nineteenth century and coincided with individuals becoming more open about their sexual identity. *E.g.*, Eskridge, *supra*, at 685; *Pedersen*, 881 F. Supp. 2d at 315-16 (explaining that conceptions of gay identity emerged in the late nineteenth century "as gay Americans moved into cities and began tentatively stepping out of the

closet"). Coextensive with the emergence of this new class, society's disapproval of homosexual conduct evolved into governmental discrimination. *Pedersen*, 881 F. Supp. 2d at 315-16; *see also* Eskridge, *supra*, at 689 ("Between 1921 and 1961, state and federal governments adopted hundreds of statutes imposing civil disabilities on 'homosexuals and other sex perverts,' to use the terminology of the era."). A particularly hostile account is contained in an infamous 1950 Congressional report investigating federal government employment of gay people. Subcomm. on Investigations to Comm. on Expenditures in the Exec. Dep'ts, Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 81-241 (1950) (the "Report"). The Report stated that "homosexuals are perverts who may be broadly defined as 'persons of either sex who as adults engage in sexual activities with persons of the same sex.'" *Id.* at 2.

The Report warned that "[t]hese perverts will frequently attempt to entice normal individuals to engage in perverted practices," and that "[o]ne homosexual can pollute a Government office." *Id.* at 4. The subcommittee concluded that gay people were unsuited for federal employment because "persons who indulge in such degraded activity are committing not only illegal and immoral acts, but they also constitute security risks in positions of public trust." *Id.* at 19. Tellingly, the Report also noted that gay individuals were "looked upon as outcasts by society generally."

Id. at 3. The idea that gays and lesbians were "sex perverts" and unfit for federal employment was given a Presidential seal of approval in the form of an Executive Order from President Eisenhower in 1953. *Pedersen,* 881 F. Supp. 2d at 316 (citing Exec. Order No. 10450, 3 C.F.R. 936, 938 (1953), which added "sexual perversion" as a ground for investigation and dismissal from federal employment).

Contemporaneous Congressional enactments such as the Immigration and Nationality Act of 1952 refused to allow gay people to enter the Country on account of their "psychopathic" personalities. *Boutilier v. INS*, 363 F.2d 488, 493-94 (2d Cir. 1966), *aff'd*, 387 U.S. 118, 120 (1967). Moreover, discrimination against gay people as a class was not limited to the federal government; state and local governments shared equally in this "long history." *Pedersen*, 881 F. Supp. 2d at 317 (citing discrimination against gay people in public employment; child custodial and visitation rights; the ability to associate freely; and legislative efforts to repeal laws that protect them from discrimination).

3. Discriminatory Violence Against Gay Individuals Continues.

The history of discrimination against gay people has long been marked by violence, and they "continue to be among the most frequent victims of all reported hate crimes." *Pedersen*,

881 F. Supp. 2d at 317 (citing H.R. Rep. No. 111-86, at 10 (2009)). In *Perry v. Schwarzenegger*, the court cited evidence showing that, from 2004 to 2008, between 246 and 283 hate crime events motivated by sexual orientation bias occurred each year and accounted for between 17% and 20% of all hate crimes in the state of California. 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010). According to the FBI's 2011 Hate Crime Statistics, 20.8% of the hate crimes committed in 2011 were motivated by sexual orientation bias.[2]

Moreover, hate crimes against gay people have been particularly violent. Reports have found that "attacks against gay men were the most heinous and brutal" and "frequently involved torture, cutting, mutilation, and beating," and "often d[id] not stop at killing the victim." Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1824-25 (1996) (citation omitted).

Studies also show that lesbian, gay, bisexual, and transgender ("LGBT") students continue to face physical and verbal abuse at alarming le-

---

[2] *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2011 Hate Crime Statistics (Dec. 10, 2012), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2011-hate-crime-statistics.

vels. The latest report of the Gay, Lesbian, and Straight Education Network's biennial National School Climate Survey (the "GLSEN Survey") showed that in 2013, a shocking 74.1% of LGBT students surveyed were verbally harassed because of their sexual orientation, 32.6% were physically harassed because of their sexual orientation, and 16.5% were physically assaulted because of their sexual orientation.[3] Discrimination and abuse has also contributed to a tragic trend of gay youth suicide.[4]

Given this record, it is clear that gay people as a class meet the history of discrimination prong of the equal protection analysis. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) ("homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world"); *De Leon*

---

[3] *See* GLSEN Survey at 22-24, *available at* http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf.

[4] *See* Adrianna M. Chavez, *El Paso Gay Teen Commits Suicide After Being Bulled*, EL PASO TIMES (June 13, 2012), http://www.elpasotimes.com/ci_20847745/; Daniel Borunda, *I couldn't make it; I love you guys: Gay teenager, 16, killed himself after bullies taunted him for two years and threatened to burn him*, Daily Mail (JUNE 14, 2012), http://www.dailymail.co.uk/news/article-2159164/Brandon-Elizares-16-killed-bullies-taunted-years-threatened-burn-him.html.

v. Perry, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014) ("The Court agrees that throughout history, many federal and state laws have categorically discriminated against homosexuals.").

As the ensuing discussion reveals, this history is particularly pressing because the State Laws are a product of it and actively perpetuate it in the same manner that anti-miscegenation laws were a product of and perpetuated illicit racial bias, and laws discriminating against women arose out of and perpetuated their own discredited forms of stereotype and gender bias. In addition, ignoring the details of the relevant history would unavoidably trivialize its victims. Just as the Court has not done so in evaluating discriminatory bias in other areas, it should not do so here.

B. The Legislative History of the State Laws Reveals that They Are Outgrowths of, and Perpetuate, Prejudice Against Gay People.

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court found Section 3 of DOMA to be unconstitutional on the ground that it violated the due process and equal protection provisions of the Fifth Amendment. DOMA was found to "demean", "degrade", "humiliate[]", "disparage", "injure", "restrict[]", "disab[le]" and cause "financial harm" to legally married same-sex couples and their children. *Id.* at 2692,

2694-96. The Court concluded that DOMA's "principal purpose [was] to impose inequality" and an unconstitutional "disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Id.* at 2692-93.

As the "beginning point" of its analysis, the Court examined the "history of DOMA's enactment and its own text" to assess whether the "design, purpose and effect of" the legislation was in keeping with constitutional principles of equal protection. *Id.* at 2689, 2693. DOMA failed this examination because "interference with the equal dignity of same-sex marriages ... was more than an incidental effect of the federal statute. It was its essence." *Id.* at 2693.

A comparative analysis between the legislative history of DOMA and those of the State Laws reveals these laws to be strikingly similar. At bottom, the State Laws are replicas of DOMA, are inspired by the same historical context as DOMA, are animated by the same discriminatory biases as DOMA, and are designed to serve the same illicit purposes as DOMA. Accordingly, like DOMA, they are unconstitutional.

1. The State Laws, Like DOMA, Arose in Reaction to Efforts To Recognize Marriage Equality.

Like DOMA, many of the State Laws arose as a reaction to a May 1993 judgment of the Ha-

waii Supreme Court presuming that Hawaii's refusal to issue marriage licenses to same-sex couples violated the State's Constitution. *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). The Hawaii Supreme Court remanded the matter for trial. *Id.* at 68.

Pending trial, Congress hurried to enact DOMA in an effort to discourage the Hawaii judiciary from "foist[ing] the newly-coined institution of homosexual 'marriage' upon an unwilling Hawaiian public." H.R. Rep. No. 104-664, at 6 (1996). Sections 2 and 3 of DOMA amended the United States Code to permit States to refuse to acknowledge same-sex marriages validly contracted under the laws of other States and defined the word 'marriage' to mean only a legal union between a man and a woman for the purposes of assessing eligibility for over 1,000 federal benefits. *See* 110 Stat. 2419; 28 U.S.C. § 1738; 1 U.S.C. §7. On September 21, 1996, DOMA was signed into law. Shortly thereafter, on December 3, 1996, the Hawaii trial court handed down its judgment in favor of the petitioning same-sex couples. *See Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Ct. App. Dec. 3, 1996).

At the state level, Michigan's legislators shared Congress' view of the hypothetical impact of the Hawaii court's decision and took action to "circumvent this process" out of "fear that gay couples would ... marry in Hawaii and return to Michigan, where the state would be forced to

recognize the legitimacy of such unions." House Legislative Analysis of Mich. House Bill 5662 of 1996 (Jun. 28, 1996). As one district court similarly observed below, the reaction among the States to events in Hawaii was "immediate and visceral," with 27 states enacting DOMA-like legislation over the next few years, including Michigan, Tennessee, and Kentucky. Love Pet. App. 127a-128a. Each of these statutes echoed Section 3 of DOMA by codifying marriage as between a man and a woman and accepting the invitation contained in Section 2 of DOMA to refuse to recognize out-of-state same-sex marriages. Mich. Comp. Laws Ann. § 551.1; Tenn. Code Ann. § 36-3-113; Ky. Rev. Stat. Ann. §§ 402.005-045.

Subsequently, however, marriage licenses were not immediately issued to same-sex couples in Hawaii because the trial-court judgment was stayed pending appeal. In the interim, Hawaii amended its Constitution to permit its legislature to define marriage as between a man and a woman (which it did), thereby removing, for the time being, the plaintiffs' legal challenge to the State's marriage laws.

Five years later, in November 2003, the Massachusetts Supreme Judicial Court ruled that the Commonwealth's ban on same-sex marriage violated its constitution, and the State permitted gay couples to marry as of May 2004. *See Goodridge v. Dep't. of Pub. Health*, 440 Mass.

309 (2003). In response, and within the year, Michigan, Kentucky, and Ohio amended their State constitutions by public voter initiative to prohibit same-sex marriage and ban the recognition of out-of-state same-sex marriages. MICH. CONST. art. 1, § 25; KY. CONST. § 233A; OHIO CONST. art. XV, § 11. Tennessee followed suit in 2006. TENN. CONST. art. XI, § 18. Undeniably inspired by DOMA, Ohio's legislature enacted its own "Defense of Marriage Amendment" in 2004. As one legislator put it, Ohio and the 37 other States that passed similar legislation during this time were doing "[j]ust like the Feds did." *See* Ohio Rev. Code § 3101.01; *Hearing on H.B. 272 Before the Ohio H. of Rep.*,125th Gen. Assemb., Reg. Sess. (Ohio 2003) ("Hearing on Ohio H.B. 272") (statement of Rep. Bill Seitz). The State Laws clearly intended to permanently prevent same-sex marriage in their respective States.

2. The State Laws, Like DOMA, Are Designed To Prevent Marriage Equality and Are Based on Discriminatory Animus.

As this Court found in *Windsor*, "the title and dynamics of [DOMA] indicate its purpose [was] to discourage enactment of state same-sex marriage laws and to restrict the freedom of choice of couples married under those laws if they are enacted." *Windsor*, 133 S. Ct. at 2693. The report of the House Judiciary Committee outlined the "Committee's concerns that moti-

vated [DOMA]." H.R. Rep. No. 104-664, at 3 (1996). It stated that DOMA was a response to a perceived "legal assault against traditional heterosexual marriage laws" by gay rights groups. *Id.* at 4. The report warns: "[t]he gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex 'marriage.'" *Id.* at 7. The report strongly urged the passage of DOMA as a means to prevent "gay rights groups and gay men and lesbians across the country [from] ... tak[ing] advantage of the Hawaii victory." *Id* at 7, 17.

Similar fears over the gay community's ability to achieve marriage equality through the courts were echoed at the State level seven years later, when Citizens for Community Values, the primary sponsor for the 2004 Ohio constitutional amendment, stated its core principal as protecting Ohio from the "inherent dangers of the homosexual activists' agenda." Obergefell Pet. App. 167a. During debates on the constitutional amendment, Kentucky's Senator McGaha perceived "[t]he institution of marriage [to be] under attack" due to events in Massachusetts, stating that "[w]e in the legislature ... have no other choice but to protect our communities from the desecration of these traditional values." Love Pet. App. 142a. The sponsor of Ohio's Defense of Marriage Amendment was similarly motivated and made clear he was "not willing to leave it to

our courts to divine what Ohio's public policy might be." Hearing on Ohio H.B. 272 (Statement of Rep. Seitz). In this way, the histories of DOMA and the State Laws are closely aligned.

3. In Considering the State Laws, as with DOMA, Sponsoring Legislators Cast Homosexuality in Exaggerated Terms as Immoral, Aberrant, and Threatening.

Consistent with the tone of the DOMA House Report, the DOMA floor debates exhibited additional discriminatory animus. Senator Byrd characterized the "drive for same-sex marriage" as "an effort to make a sneak attack on society by encoding this aberrant behavior in legal form." 142 Cong. Rec. S10,110 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). Senator Lott spoke of the "threatening possibilities" for the country should it accept same-sex marriage. *Id.* at S10,101 (statement of Sen. Lott). In related fashion, Congressman Coburn insisted that "[t]he fact is, no society ... has lived through the transition to homosexuality and the perversion which it lives [sic] and what it brought forth." 142 Cong. Rec. 16,972 (1996) (statement of Rep. Coburn).

Legislators and politicians at the state level shared the same rhetoric, comparing the ambition of marriage equality to a form of immoral assault on conventional heterosexual society that

would lead to social decline. As Ohio moved to amend its laws in 2004, Governor Taft stated in support of the amendment that "[a]t a time when parents and families are under constant attack within our social culture, it is important to confirm and protect those environments." Obergefell Pet. App. 167a. Ohio's Congressman Young insisted similarly that only through heterosexual marriage was "cohesion and strength ... given to societies." Hearing on Ohio H.B. 272 (statement of Rep. Ron Young). More dramatically, the community sponsor of Ohio's constitutional amendment suggested that same-sex marriage would stop heterosexual procreation within the State, insisting that "[w]e won't have a future unless [heterosexual] moms and dads have children." Obergefell Pet. App. 168a. Reacting to similar comments, Ohio's Representative Redfern candidly summarized that support for the State's Defense of Marriage Amendment was motivated by "casting judgment upon others, criticizing one's life and livelihood and the way [homosexuals] raised their children." Hearing on Ohio H.B. 272 (statement of Rep. Chris Redfern). These and similar comments underscore the extent to which DOMA and the State Laws share the same discriminatory trajectory and exhibit a fierce prejudice toward gay people as a "politically unpopular group." *Cleburne*, 473 U.S. at 446-47.

4. In Considering the State Laws, Sponsoring Legislators Further Disparaged and Trivialized Same-Sex Marriage, as Did the Sponsors of DOMA.

The congressional debates on DOMA were punctuated with warnings that acceptance of same-sex marriage would open the floodgates to polygamy, incest, bestiality, and pedophilia. *See* 142 Cong. Rec. 16,971 (1996) (statement of Rep. Largent); *id.* at 16,974 (statement of Rep. Talent). This misinformation was clearly intended to "appeal to [Congress's] worst fears and emotions" by "fan[ning] the flames of intolerance and prejudice." *Id.* at 16,978 (statement of Rep. Waxman).

Legislators warned that alteration of the traditional concept of marriage would start the country on a slippery slope toward eventually permitting unions between any odd combination, including "adult incestuous marriages." *Id.* at 16,974 (statement of Rep. Talent). Representative Largent asked rhetorically: "What logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child or any other odd combination that we want to have ...? [A]nd it doesn't even have to be limited to human beings, by the way. I mean it could be anything." *Id.* at 16,971 (statement of Rep. Largent).

By linking marriage equality to polygamy, incest, bestiality, and pedophilia, these comments intentionally trivialized and denigrated same-sex unions. *See also* 142 Cong. Rec. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth) (characterizing marriage equality as "just another means of securing government benefits"). These views were summed up by Representative Canady when he opened the House of Representatives debate on DOMA by stating that, ultimately, the "law should not treat homosexual relationships as the moral equivalent of the heterosexual relationships on which the family is based. That is why we are here today." 42 Cong. Rec. 16,969 (1996) (statement of Rep. Canady).

In enacting the State Laws, state legislators and sponsors used similar language and analogies. Like their federal counterparts, Ohio's legislators expressed fears that if "you begin to allow marriage to be defined in more than one way, you are on a slippery slope ... where does it end? It's no different for polygamists." *Hearing on H.B. 272 Before the Ohio S.*, 125th Gen. Assemb., Reg. Sess. (Ohio 2004) ("Senate Hearing on Ohio H.B. 272") (statement of Sen. Kris Jordan). Michigan's legislators did the same: "Same-sex marriages would weaken the moral standard that underpin the traditional marriage and would open the possibility of sanctioning other types of alternative unions, such as polygamy." Senate Legislative Analysis of Se-

nate Bill 937 and House Bill 5662, p.2 (Mar. 10, 1996). Sponsors of Ohio's public initiative went further by "stating that marriage equality advocates sought to eliminate age requirements for marriage, advocated polygamy and sought elimination of kinship limitations so that incestuous marriages could occur." Obergefell Pet. App. 168a. Similarly, Tennessee's Senator Fowler stated that taking the idea of same-sex marriage to its "logical extremes" would lead to the State "allowing humans to marry animals." *Hearing on S.B. 2305 Before the Tenn. S.*, 99th Gen. Assemb., Reg. Sess. (Tenn. 1996) (statement of Sen. David Fowler).

The fact that Michigan saw fit to amend its incest laws at the same time it took steps to prohibit same-sex marriage indicates the extent to which lawmakers linked the two. Mich. Comp. Laws Ann. § 551.3. Indeed, despite having already made it clear that same-sex marriage was prohibited in other legislation, the amendment to the Michigan incest law unnecessarily included the words "or another man" at the end of a long list of relatives a man may not marry, including his mother, grandmother, "grand-father's wife [or] wife's granddaughter." *Id.* Kentucky followed suit with its polygamy laws at the same time it prohibited same-sex marriage. *See* Ky. Rev. Stat. Ann. § 402.020. These disparaging analogies reveal the extent to which the State Laws, like DOMA, serve to degrade the "person-

hood and dignity" of gays and lesbians. *Windsor* 133 S. Ct. at 2696.

5. The Historical Record Behind DOMA and the State Laws Reveals the Same Stereotypical Disapproval of Gay People.

The DOMA House Report identified an intense disapproval of homosexuality as part of its fundamental rationale. It stated:

> Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional ... morality ... [DOMA] serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.

H.R. Rep. No. 104-664, at 15-16 (1996). In similar fashion, Representative Coburn embellished this stereotypical disapproval with his own unfortunate stereotype of gay people as largely promiscuous. He summarized: "[t]he real debate is about homosexuality and whether or not we sanction homosexuality in this country." 142 Cong. Rec. 16,972 (1996) (statement of Rep.

Coburn); *id.* ("We hear about diversity, but we do not hear about perversity, and I think that we should not be afraid to talk about the very issues that are at the core of this.").

In equally dramatic tones, community sponsors of Ohio's constitutional amendment publicly disparaged gay people by declaring that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." Obergefell Pet. App. 168a. During committee hearings on Tennessee's statute, Representative Peach likewise disparagingly asked one witness: "Do you ever [sic] know of a case where a union of two men or two women has produced anything of importance to this society?" *Hearing on H.B. 2907 Before the H. Judiciary Comm.*, 99th Gen. Assemb., Reg. Sess. (Tenn. 1996) (statement of Rep. James Peach).

As candidly summarized by Ohio's Senator Hagan, disapproval of homosexual sex motivated Ohio's Defense of Marriage Amendment:

> I think all of you sitting there with a straight face, no pun intended, should remember that the issue is a lot about sex ... you know exactly what this issue is about: sexual preference, uncomfortable about some act ... because you want to dictate

> who should have sex and how they do it and when they do it in their bedrooms.

Senate Hearing on Ohio H.B. 272 (statement of Sen. Bob Hagan). These and similar comments reveal the extent to which the State Laws are loaded with discriminatory bias and supply "strong evidence" of the "purpose and effect of disapproval of" gay people. *Windsor* 133 S. Ct. at 2693. Regardless of how the advocates of the State Laws currently characterize their underlying rationales, it is clear that, as with DOMA, they are based on stereotype and animus.

C. Over the Last Century, Discriminatory Animus of the Kind that Motivated the State Laws Has Doomed Other Invidiously Discriminatory Legislation.

For over a century, opponents of interracial marriage and women's rights defended discriminatory laws on grounds strikingly similar to those used to justify the State Laws, and DOMA before them. Just as these grounds hold no water in the areas of interracial marriage and gender equality, they hold no water here.

1. The Grounds Used To Justify the State Laws Are Substantially Similar to the Invidious Grounds Used To Justify Anti-Miscegenation Statutes.

The State Laws are just the most recent example of laws ostensibly based on traditional majoritarian morality, but whose true origins spring from invidious discriminatory intent. The anti-miscegenation laws invalidated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), are classic examples.

In 1691, Virginia passed the first anti-miscegenation law to prevent "abominable mixture and spurious issue." Walter Wadlington, *The* Loving *Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1191-92 & n.17 (1966) (quoting 3 Laws of Va. 86-87 (Hening 1823)). Nearly two centuries later, Senator Doolittle justified treating interracial marriage as "criminal" on the ground that "natural instinct revolts at it as wrong." Cong. Globe, 37th Cong., 2d Sess., app. 84 (1862). Similarly, in *Eggers v. Olson*, the court derided the "amalgamation of the races" as "unnatural, [and] always productive of deplorable results." 231 P. 483, 484 (Okla. 1924) (citation omitted); *see also Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889) (stating that the penal statutes criminalizing interracial marriage represented the "very pronounced convictions of the people ... as to the

demoralization and debauchery involved in such alliances").

These invidious majoritarian "moral" sentiments used to justify anti-miscegenation laws are substantially indistinguishable from those used to justify the State Laws. Indeed, the parallels are uncanny. Each State in this case contends that the State Laws are necessary to protect the tradition and morality of heterosexual marriage (Ohio and Michigan), the "common good" (Tennessee), and to encourage and support only those couples with the "natural" ability to procreate (Kentucky). DeBoer Pet. App. 106; Obergefell Pet. App. 84a; Tenn. Code Ann. § 36-3-113; Love Pet. App. 117a. Similarly, over a century ago in *Green v. State*, a court justified a ban on interracial marriage on precisely the same theory: "It is through the marriage relation that the homes of a people are created .... These homes, in which the virtues are most cultivated and happiness most abounds, are the true ... nurseries of States." 58 Ala. 190, 194 (1877).

Tennessee's statute prohibiting same-sex marriage essentially co-opts this very view, citing the heterosexual "family as essential to the social and economic order and the common good and as the fundamental building block of our society." Tenn. Code Ann. § 36-3-113. Echoing this view, Tennessee's Representative Baugh stated that "the idea of same-sex marriage is ri-

diculous" on the theory that "[t]raditional marriages have been ordained by all major religions and every major civilization. This provided a social stability that civilizations have enjoyed." *Hearing on H.B. 13 Before the H. Judiciary Comm.*, 1998 Gen. Assemb., Reg. Sess. (Ky. 1998) (statement of Rep. Sheldon Baugh).

These descriptions of what heterosexual marriage represents within society unavoidably embody the degrading notion that gay couples are inherently incapable of contributing positively in the way that heterosexual couples contribute and that any attempt to allow them to participate fully in society would necessarily produce defective results. This view bears a chilling resemblance to the discredited statements of the court in *Scott v. Georgia* made in the context of condemning interracial unions: "Our daily observation shows us, that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full-blood of either race." 39 Ga. 321, 323 (1869).

As Justice Blackmun noted in his dissent in *Bowers v. Hardwick*, the Court's "prior cases make ... abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from con-

stitutional attack." 478 U.S. 186, 216 (1986) (Blackmun, J., dissenting). Nor can the "justifications" of tradition and morality offered in defense of the State Laws legitimatize their discriminatory intent.

2. The Grounds Used To Justify the State Laws Track the Invidious Grounds Used To Justify Discrimination Against Women.

The various rationales for the State Laws are also similar to those used historically to justify the disparate treatment of women—those based on notions of the "traditional family" and the fear that the family unit would disintegrate if that "tradition" were altered, as well as discriminatory beliefs that men are more suited for civil roles outside the home. For example, as a justification for denying women the right to practice law, Justice Bradley offered the view in 1872 that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). He further opined that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.*

Justice Bradley was not alone in his thinking. When debating women's suffrage, members of the House and Senate also voiced the opinion

that a woman's place in society was strictly limited to the domestic sphere. In 1874, in opposing a proposed amendment to extend the right of suffrage to women in the Pembina Territory (today, North Dakota), Senator Bayard stated:

> Under the operation of this amendment what will become of the family ...[?] You will no longer have that healthful and necessary subordination of wife to husband .... I can see in this proposition for female suffrage the end of all that home-life and education which are the best nursery for a nation's virtue.

2 Cong. Rec. 4342 (1874).

Such views have long been discredited as grounds for disparity in gender treatment. *See Stanton v. Stanton*, 517 P.2d 1010, 1012-13 (Utah 1974), *rev'd*, 421 U.S. 7, 17-18 (1975) (statute setting out disparate age of majority for men and women based on "traditional" gender roles could not survive an equal protection attack). Yet, essentially the same justifications are offered in support of the State Laws, just as they were offered in support of DOMA. They are as invalid in the context of marriage equality as they were in the context of gender equality.

D. Given that Laws Prohibiting Same-Sex Marriage Embody Invidious Discrimination, They Should Be Subject to at Least Intermediate Scrutiny.

The Equal Protection Clause of the Fourteenth Amendment mandates that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws," and requires "that 'all persons similarly circumstanced shall be treated alike.'" U.S. CONST. amend. XIV, § 1; *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). In determining whether a law that distinguishes between two classes of people satisfies equal protection, the "general rule" is that "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. The "rational basis" rule, however, does not apply where a statute engages in certain "suspect" or "quasi-suspect" classifications that "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," and "tend to be irrelevant to any proper legislative goal." *Plyler*, 457 U.S. at 216 n.14. Suspect classifications based on factors such as race, alienage, or national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy" and therefore "will be sustained only if they are suitably tailored to serve

a compelling state interest." *Cleburne*, 473 U.S. at 440. Classifications based on "quasi-suspect" classes such as gender "generally provide[] no sensible ground for differential treatment" and will be upheld only if found to be "substantially related to a sufficiently important governmental interest." *Id.* at 440-41. In such cases, the burden is on the government to demonstrate an "exceedingly persuasive" justification for the classification that is "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Classifications violate equal protection where they are based on "archaic and overbroad generalizations" or "outdated misconceptions" concerning a class. *J.E.B. v. Alabama*, 511 U.S. 127, 135 (1994) (internal quotation marks omitted).

The Court has yet to define the appropriate level of scrutiny to apply to a classification based on sexual orientation. However, in declaring DOMA unconstitutional, *Windsor* focused not on whether DOMA was justified by a legitimate rational basis, but on its "principal purpose ... to impose inequality." *Windsor*, 133 S. Ct. at 2694. Federal courts of appeals have construed *Windsor* as "establish[ing] a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

The Court has enumerated four factors relevant to a determination of the appropriate level of scrutiny applicable to a given class: (1) whether the particular group has suffered a history of discrimination; (2) whether individuals within the group "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group;" (3) whether the group is a minority or politically powerless, *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987) (*citing Lyng v. Castillo*, 477 U.S. 635, 638 (1986)); and (4) whether the characteristic distinguishing the group "bears [any] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 441 (citation omitted). The district courts below that considered these factors held that heightened scrutiny should be applied, Love Pet. App. 110a-114a; Obergefell Pet. App. 142a-143a, 203a, while the others deemed the analysis unnecessary because the laws could not survive even lenient rational basis review, DeBoer Pet. App. 125-26; *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769 (M.D. Tenn. 2014). The Sixth Circuit below acknowledged these factors, DeBoer Pet. App. 50-51, but failed to address the district courts' analyses or conduct an adequate analysis of its own regarding classifications based on sexual orientation. Instead, the court applied rational basis review grounded largely on its theory that "[t]he State's undoubted power over marriage provides an independent basis for reviewing the laws be-

fore us with deference rather than skepticism." DeBoer Pet. App. 56.

Proper consideration of the relevant factors makes clear that classifications based on sexual orientation should be subject to at least intermediate scrutiny. In particular, the history of discrimination against gay people mirrors that suffered by other suspect and quasi-suspect classes and warrants the application of intermediate scrutiny to laws that classify based on sexual orientation. Thus, to satisfy equal protection, it must be demonstrated, at a minimum, that the State Laws are "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

First, as discussed above, the history of discrimination against gays and lesbians is both severe and well documented. Second, sexual orientation is an immutable characteristic. As one district court observed below, "[t]here is now broad medical and scientific consensus that sexual orientation is immutable." Obergefell Pet. App. 202a.

Third, gays and lesbians lack significant political power. As noted by one of the district courts below, the gay community's lack of political power "is demonstrated by the absence of statutory protections for them," citing as examples that: (1) "the gridlocked U.S. Congress has failed to pass any federal legislation prohibiting

discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing;" (2) "the majority of states, including Ohio, have no statutory prohibition on firing, refusing to hire, or demoting a person in private sector employment solely on the basis of their sexual orientation;" (3) "the majority of states, including Ohio, do not provide statutory protections against discrimination in housing or public accommodations on the basis of sexual orientation;" and (4) "[i]n the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic anti-discrimination protections for gay, lesbian, and bisexual individuals have failed." Obergefell Pet. App. 199a.

Fourth, sexual orientation has no relation to an individual's ability to contribute to society. Indeed, as the Second Circuit aptly observed, "[t]he aversion homosexuals experience has nothing to do with aptitude or performance." *Windsor*, 699 F.3d at 182-83; *see also* Love Pet. App. 112a. ("[T]he court cannot think of any reason why homosexuality would affect a person's ability to contribute to society."). Because the factors supporting heightened scrutiny are present here, such review is warranted.

E. The State Laws Do Not Serve a Legitimate, Important, or Compelling Interest, but Rather Simply Rest on Stereotype and Animus.

Like DOMA, the State Laws were not enacted to serve an important or compelling government interest, but rather as a knee-jerk reaction grounded in prejudice and animosity toward gay people. Legislation such as this, that "rest[s] on irrational prejudice," cannot survive any level of scrutiny, let alone intermediate scrutiny. *See Cleburne*, 473 U.S. at 450.

The Sixth Circuit below identified two interests allegedly served by the prohibitions on same-sex marriage: (1) "to regulate sex, most especially the intended and unintended effects of male-female intercourse," DeBoer Pet. App. 32 and (2) "to wait and see before changing a norm that our society (like others) has accepted for centuries," *id.* at 35. In addition, the court offered a further basis for the States' anti-recognition laws: "preserv[ing] a State's sovereign interest in deciding for itself how to define the marital relationship." *Id.* at 63. Moreover, the district court opinions below and the relevant legislative histories of the State Laws reference still another basis offered by the laws' proponents steeped in notions of tradition and moral disapproval of same-sex marriage—i.e. "preserving the state's institution of traditional marriage," Love Pet. App. 145a, "upholding tradition

and morality," DeBoer Pet. App. 106, and "the desire not to alter the definition of marriage without evaluating steps to safeguard the religious rights and beliefs of others," Obergefell Pet. App. 180a. None of these reasons are related to a legitimate government interest, let alone substantially related to an important government interest, and thus do not survive *any* level of scrutiny.

1. Laws Prohibiting Same-Sex Marriage Do Not Promote Responsible Procreation.

The Sixth Circuit held that limiting marriage to solely those unions between a man and a woman rationally furthers the States' interest in "creat[ing] stable family units for the planned and unplanned creation of children" by "encourag[ing] couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means." DeBoer Pet. App. 33. But neither the Sixth Circuit nor the States explain how excluding same-sex couples furthers this goal or how expanding the definition of marriage to include same-sex couples would somehow hinder it.

Other courts faced with procreation-related justifications for laws prohibiting same-sex marriage have, in careful and well-reasoned opinions, rejected them outright. *See Latta v.*

Otter, 771 F.3d 456, 471-73 (9th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 381-83 (4th Cir. 2014). The Seventh Circuit, in response to the argument that the government encourages marriage in order to prevent "accidental births" resulting in "abandonment of the child," noted that "many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adopted parents were married." *Baskin*, 766 F.3d at 654. The court further explained that an estimated nearly 200,000 American children are being raised by same-sex couples, and that same-sex couples are up to five times more likely to be raising an adopted child than their heterosexual counterparts. *Id.* at 663. As the Court recognized in *Windsor*, denying recognition of same-sex marriages "demeans" the couple and "humiliates" their children by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694. Thus, the States' interest in providing stable family units for all children is in fact furthered by allowing same-sex marriage.

Nor is there any evidence that "heterosexual married couples provide the optimal environment for raising children." DeBoer Pet. App. 127; *see* Gregory M. Herek, *Evaluating the Methodology of Social Science Research on Sexual Orientation and Parenting: A Tale of Three Stu-*

dies, 48 U.C. DAVIS L. REV. 583, 607-19 (2014) (discussing methodological flaws in studies showing evidence of negative effects on children raised by same-sex couples). At trial in the Michigan case below, the district court heard and found "fully credible" extensive evidence that "there is no discernible difference in parenting competence between lesbian and gay adults and their heterosexual counterparts" or "in the developmental outcomes of children raised by same-sex parents as compared to those children raised by heterosexual parents." DeBoer Pet. App. 107, 109.

2. No Government Interest Is Furthered by Taking a "Wait and See" Approach Before Changing the Definition of Marriage.

The Sixth Circuit also deemed rational the States' interest in postponing an expansion of the definition of marriage until an appropriate time had passed to assess "the benefits and burdens" experienced by other States. But a desire to proceed with caution cannot be a legitimate basis to permit blatantly discriminatory legislation to stand. In *Frontiero v. Richardson*, for example, the Court chose to apply heightened scrutiny to a law discriminating based on gender over the objection of Justice Powell that the Court should wait for the States to ratify the Equal Rights Amendment, "which if adopted will resolve the substance of this precise question."

411 U.S. 677, 692 (1973) (Powell, J., concurring). As Judge Daughtrey's dissent in the Sixth Circuit below pointed out, "[i]f the Court had listened to the argument, we would, of course, still be waiting." DeBoer Pet. App. 99.

3. The States' Interest in Defining the Marital Relationship Does Not Justify Unconstitutional Discrimination.

While *Windsor* did recognize the States' legitimate interest in defining marriage, it made clear that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor* 133 S. Ct. at 2691. Moreover, laws denying recognition of same-sex marriages lawfully performed in other States actually undermine state sovereignty by refusing to honor the decisions of those States that do recognize same-sex marriage. This only serves to underscore the discriminatory animus of the State Laws.

4. Tradition Alone Is Not a Legitimate State Interest.

The purpose of the Equal Protection Clause is "not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities." *Watkins v. U.S. Army*, 875 F.2d 699, 718 (9th Cir. 1989) (Norris, J., con-

curring); *Lawrence*, 539 U.S. at 577-78 ("neither history nor tradition" can save unconstitutional laws). Marriage laws, in particular, have evolved considerably. *See Latta*, 771 F.3d at 475 (noting that "within the past century, married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands" and "lost their citizenship when they married foreign men").

As the Seventh Circuit observed in finding unconstitutional prohibitions on same-sex marriage in Indiana and Wisconsin, the argument in favor of "traditional" heterosexual marriage "runs head on into *Loving v. Virginia*." *Baskin*, 766 F.3d at 666. That laws forbidding interracial marriage dated back to colonial times could not save Virginia's anti-miscegenation law from being deemed unconstitutional. *Id.* "If no social benefit is conferred by a tradition *and* it is written into law *and* it discriminates against a number of people and does them harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause." *Id.* at 667.

F. The State Laws Violate Petitioners' Fundamental Right To Travel.

It is "firmly established and repeatedly recognized" that "[t]he constitutional right to travel from one State to another ... occupies a

position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). Moreover, the right to travel "embraces at least three different components." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). These components are: (1) "the right of a citizen of one State to enter and to leave another State," (2) "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Id.* A statute "implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations and internal quotations omitted).

Conceptually, the right to travel is a natural corollary to the Equal Protection Clause. Indeed, "the right to travel achieves its most forceful expression in the context of equal protection analysis." *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J. concurring). The right to travel operates within the sphere of equal protection because it protects against the improper classification of citizens based on their different relationships with a State. *See Soto-Lopez*, 476 U.S. at 903-04 ("Because the creation of different classes of residents raises equal protection con-

cerns, we have also relied upon the Equal Protection Clause in these [right to travel] cases.").

Because the right to travel is a fundamental right, a classification that burdens the exercise of the right "constitutes an invidious discrimination denying ... equal protection of the laws" absent a compelling governmental interest. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); *Soto-Lopez*, 476 U.S. at 904 ("Where we found such a burden [on the right to travel], we required the State to come forward with a compelling justification."). In addition, even where a compelling governmental interest can be shown, the law "cannot choose means that unnecessarily burden or restrict constitutionally protected activity." *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

In the Court's most recent discussion of the right to travel, it considered a California statute limiting welfare benefits for the first year of residency to the amount payable by the resident's prior State of residence. *Saenz*, 526 U.S. at 492. The Court held that the statute infringed upon the residents' right to travel, *id.* at 504-05, and rejected the State's financial justification for restricting benefits because "[n]either the duration of respondents' California residence, nor the identity of their prior States of residence, has any relevance to their need for benefits" nor did "those factors bear any relationship to the State's interest in making an equitable allocation of the

funds to be distributed among its needy citizens." *Id.* at 507.

The State Laws in this case likewise violate the right to travel, but in a far more degrading manner. In defining marriage as solely a union between a man and a woman, Michigan, Ohio, Tennessee, and Kentucky undeniably penalize same-sex couples should they exercise their right to travel to those States by (1) denying recognition to legal marriages granted elsewhere and (2) denying same-sex couples the right to marry like their heterosexual peers. Same-sex couples already married in another State must abandon their financial and emotional security should they choose to move to a State within the Sixth Circuit, and likewise endure the indignity of a second-class status.

Marriage has long been recognized as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (citations omitted). As such, marriage is exactly "the kind of right that triggers right-to-travel guarantees." Mark Strasser, *Interstate Marriage Recognition and the Right to Travel*, 25 WIS. J.L. GENDER & SOC'Y 1, 25 (2010).

In this instance, the State Laws do more than deprive same-sex couples of financial benefits; they deny their marriages the respect and

dignity they deserve as recognized in *Windsor*. 133 S. Ct. at 2689 ("same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons"). None of the State Laws serve a compelling governmental interest. Nor are they narrowly tailored to serve such an interest. Accordingly, they are unconstitutional.

CONCLUSION

For all of the foregoing reasons, as well as those offered by Petitioners, the decision of the court below should be reversed.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
Dennis H. Hranitzky
Mark P. DiPerna
Kate M. O'Keeffe
Victoria Campbell Fitzpatrick
Mayer B. Grashin
Kevin P. Brost
Negin Hadaghian
Rabia Muqaddam
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

March 6, 2015 *Counsel for Amicus Curiae*